United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2603

B
Pgs

ORIGINAL

To be argued by
IRVING ANOLIK

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

- against -

MICHAEL CAMPOREALE,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

IRVING ANOLIK
Attorney for Defendant-Appellant
225 Broadway
New York, New York 10007
732-3050

(8007) LUTZ APPELLATE PRINTERS, INC
Law and Financial Printing

South River, N. J. (201) 257-6850 | New York, N. Y. (212) 565-6377 | Philadelphia, Pa (215) 563-5587 | Washington, D. C. (202) 783-7288

TABLE OF CONTENTS

Contents

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Contents

Statutes Cited:

Contents

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

UNITED STATES OF AMERICA,

Appellee,

-against-

MICHAEL CAMPOREALE,

Defendant-Appellant.

----------x

APPELLANT'S BRIEF

STATEMENT

Defendant-appellant Michael Camporeale appeals from a judgment of the United States District Court for the Southern District of New York, rendered the 22nd day of November, 1974, convicting him of perjury, after trial before Lasker, D.J., and a jury. The Court sentenced the defendant to 6 months imprisonment and 2 years probation.

The appellant, however, is presently at liberty pending the disposition of this appeal.

INTRODUCTORY

The defendant had been indicted in a true bill naming a number of co-defendants involved in a Strike Force prosecution of alleged organized gambling activities.

The indictment, with respect to Camporeale however, charged perjury and his case was severed from the trial of the others.

The co-defendants went to trial non-jury and their case is presently sub judice before this Tribunal, at least at the time this brief is being written.

We submit that the record herein reveals that the perjury indictment was obtained upon evidence that as a matter of law was so equivocal that it did not amount to perjury. Furthermore, the perjury was predicated upon the appellant's alleged denial that he knew one Visconti and Weygand. The Government had in its possession photographs of the defendant and these two individuals together. Yet the prosecutor presenting the case never showed these photographs to appellant. Had he seen these, under 18 U.S.C. §1623(d) he had a right of recantation. This opportunity was denied.

Instead, the prosecutor presenting the matter to the Grand Jury, at which proceeding the defendant testified, showed him some 18 photographs of individuals, including Visconti and Weygand. There is no evidence, unfortunately, to establish who was depicted in the other

photographs. We submit that the testimony that the assistant prosecutor presenting the matter to the Grand Jury did not personally know of the existence of the photographs of Camporeale with Visconti and Weygand, is palpably untenable since the Government had possession of these photographs for several months prior to the presentation.

As was stated in Santobello v. New York, 404 U.S. 257, "the left hand must know what the right hand is doing", and we maintain that it is therefore indefensible to claim that this particular prosecutor at that point in time was unaware of the existence of exhibits that would have precluded the possibility of Camporeale committing perjury. As the record is, however, there is a disturbing, gnawing feeling that the perjury indictment was nothing more than a trap and that Camporeale was called as a witness solely to obtain such an indictment and not for any substantive reason.

We also call the Court's attention to substantial error which was made when the clerk, ex parte, delivered a copy of the defendant's Grand Jury minutes to the jury without previously advising both counsel of the jury's

request therefor. As a result of this, the jury was permitted to read the unredacted Grand Jury testimony of Camporeale which, unfortunately, included the fact that he had previously been convicted for stealing a car, violation of the drug laws with respect to heroin, two petty larceny convictions, and several disorderly conduct convictions.

It should be further noted that since the defendant did not take the stand, there was no authority to place his character in issue. No doubt one of the strong motivating reasons for the defendant not taking the stand was the fear that his rather formidable criminal record would be disclosed to the jurors. The disadvantage therefore to Camporeale is not de minimus but vitiated the whole purpose of his not taking the stand.

In Stein v. New York, 346 U.S. 156, the Supreme Court of the United States made it clear that a defendant in a criminal case could testify or remain silent, but that if he testified he waived his privilege against self-incrimination and, consequent exposure to cross-examination concerning his background. In the case at

bar Camporeale was inflicted with the negative aspects of having testified without the benefit of actually appearing before the veniremen.

In addition to other errors, we would also point out that we are preserving an attack upon the constitutionality of 18 U.S.C. Section 1623, which eliminated the two-witness rule for perjury prosecutions.

THE PROSECUTION'S CASE

Bob Reutter, an agent with the Federal Bureau of Investigation, testified for the prosecution that he had been conducting a gambling investigation along with several other men in his Bureau (22-24).*

In the course of this investigation, photographs were taken. In addition, visual observations were made. Reutter declared that he personally saw defendant on at least one occasion with Weygand and on more than one occasion with Visconti (26-28; 31; 55-61; 65; 76).

---

* Numerals in parentheses refer to pages of the official court reporters minutes of trial, unless otherwise indicated.

Ruetter explained that surveillance photographs were taken about nine months prior to appellant's Grand Jury appearance (81).**

Reutter recalled that the surveillance photos were taken in about February of 1972, while the Grand Jury proceedings started in about October of 1972 (81-83).

Steve Barrett, also attached to the F.B.I., testified that he, too, had seen defendant in the presence of Visconti on February 7th and March 6th of 1972 (87, 88).

The testimony of several other F.B.I. agents followed, all of whom confirmed the fact that they had seen defendant in the presence of Visconti and, on at least one occasion, in the presence of Weygand (106; 116-123; 142; 146).

Jeffrey McMurtrey of the Federal Bureau of Investigation stated that defendant made three appearances before the Grand Jury (135). Apparently at none of these was he shown the surveillance photos (81-83).

** This fact is significant since the United States Attorney claimed that special prosecutor Friedman was unaware of the existence of photos depicting defendant in the actual presence of Visconti and Weygand. A nine months hiatus certainly implies that these photos must have been shown to Friedman. How could he have prepared for the presentation without fully discussing the surveillance activities of the agents?

Agent Carl Amaditz of the F.B.I. declared that Weygand, although a target of an investigation involving gambling had never been prosecuted, despite the fact that he had been arrested for that crime (148, 157).

David Weygand, testifying for the prosecution, said that he was a student and had previously been convicted of a misdemeanor, namely possession of diet drug pills (158, 159). He asserted that he had been employed by Visconti in May of 1972 to pick up packages which took him about three hours a day (160-163).

Weygand declared that he had a conversation ..th Visconti and with Camporeale (167, 170-171).

Defendant did not take the stand, nor did he call any witnesses in his behalf. His redacted Grand Jury testimony however, was read into the record (212-224). A perusal of those minutes reveals that appellant was threatened several times by the prosecutor conducting the Grand Jury proceeding, which was one of the objections taken by the defense to the sufficiency of those minutes (225-227).

At page 227 of the record, Agent Reutter declared that he did not recall whether Assistant United States Attorney Friedman, who conducted the Grand Jury interrogation of appellant, was aware of the existence of the photographs depicting Camporeale together with Weygand and/or Visconti when the Grand Jury proceeding was in process, but Reutter said that he did recall that there came a time when he informed Mr. Friedman of this fact (227, 228). He was not certain when.

The Court below was obviously disturbed over the manner of presentation of this case to the Grand Jury and was constrained to note at page 230 of the record that a strong argument could be made and that

> "It does seem to me...as to be very strong evidence of an intention willfully to hang a man for perjury."

It was also pointed out by the defense that there was no proper identification of what photographs were actually shown to the defendant when he appeared before the Grand Jury (234, 235).

THE DEFENSE

Addie Corradi, called as a witness for the defense, testified that she was a social worker attached to the Mount Vernon Methadone Clinic (241, 242). She stated

that she knew Michael Camporeale and that he was registered at the methadone clinic (240-245). As a matter of fact, she stated that appellant was her patient and she was his counselor (246, 247).

The Court, however, refused to permit the witness Corradi to testify from her records that appellant received methadone on the days that he appeared before the Grand Jury (248).

ARGUMENT

POINT I

DEFENDANT-APPELLANT WAS SUBSTANTIALLY PREJUDICED BY THE BLUNDER PERPETRATED DURING THE DELIBERATIONS OF THE TRIAL JURY WHEN THE CLERK DELIVERED AN UNREDACTED COPY OF CAMPOREALE'S GRAND JURY TESTIMONY TO THE JURORS AT THE DIRECTION OF THE TRIAL JUDGE, OF WHICH FACT BOTH COUNSEL WERE UNAWARE UNTIL IT WAS TOO LATE. THE MINUTES FURNISHED INCLUDED THE PRIOR CONVICTIONS AND CRIMINAL BACKGROUND OF APPELLANT, WHO NEVER TOOK THE STAND AT THE TRIAL.

It has been held that a person is presumed innocent and need not take the stand in his own defense when he is charged with a crime. The appellant herein had a record of several convictions, including a violation of

the drug laws with respect to heroin; theft of an automobile, petty larceny (two counts), and several counts of disorderly conduct.

He elected not to take the stand in his own defense and one of his motivating factors which we have a right to infer was his concern over the probability that his convictions would be aired before the jurors.

The prosecutor and the defense counsel had agreed that under no circumstances would that portion of the Grand Jury minutes which referred to defendant's criminal background, be read or furnished to the trial jurors. Pages 28 and 29 of the Grand Jury minutes contain references to the aforesaid prior convictions of the defendant.

During its deliberations, the trial jurors asked for the testimony of the defendant before the Grand Jury. The Clerk, having been instructed by the Court previously to furnish the talismen with exhibits, did not consult defense counsel or the prosecutor, but merely sent in a full set of the Grand Jury minutes, which contained no redactions.

An appropriate motion under Rule 29(c) was made to

set aside the verdict on the grounds that this error was by no means trivial. The Court refused to grant the motion (312).

It is elementary that where a defendant is charged with a crime, he may obtain certain benefits by not testifying, one of which is that his character and background may not be put into evidence, and that in fact no comment may even be made with respect to such background.

On the other hand, where he takes the stand, then he subjects himself to full cross-examination, including his character, but at least he obtains the benefit of addressing the jurors through his testimony and answering the charges in open Court. In the case at bar, however, the blunder of the clerk deprived appellant of the benefits of his silence, but did not give him the concommitant privilege of defending himself in open Court (Stein v. New York, 346 U.S. 156. See also, Chapman v. California, 386 U.S. 18, reh. den. 386 U.S. 987; Brown v. United States, 356 U.S. 148, 72 A.L.R.2d 818, reh. den. 356 U.S. 948; Brooks v. Tennessee, 406 U.S. 605; Anderson v. Nelson, 390 U.S. 523; and Fontaine v.

California, 390 U.S. 593, reh. den. 391 U.S. 929).

We therefore urge that irrespective of any other error in the case, this monumental mistake warrants a new trial since the fault of the defendant did not cause the error and no rights were waived permitting the furnishing of unredacted minutes. On the contrary, it is undenied that both litigants had agreed that this portion of the minutes could not be sent to the jury.

It is noteworthy that the Court was advised on the record, at pages 225 and 226, that the Grand Jury minutes contain references to the defendant's criminal record, so there was no doubt that the clerk and everyone else in that courtroom should have been aware of that fact. The affidavit of the trial counsel, Alvin Geller, specifically declared, without contradiction, that the Government and defense had agreed that this portion of the Grand Jury minutes should not be disclosed to the jurors. Even without such a stipulation, however, it is obvious that no one who has any conception of a criminal trial would supply such information to the jury without the express consent of the defendant. Lack of prejudice cannot be assumed (Chapman v. California, supra).

Even a negligent error warrants vacating of a judgment if it could be prejudicial to a defendant (Brady v. Maryland, 373 U.S. 83).

POINT II

THE TESTIMONY OF APPELLANT IN THE GRAND JURY WAS NOT TANTAMOUNT TO PERJURY AS A MATTER OF LAW SINCE THE QUESTIONS WERE SUBSTANTIALLY EQUIVOCAL AND THE ANSWERS GIVEN WERE NOT CATEGORICAL. MOREOVER, CAMPOREALE WAS GRAVELY PREJUDICED BY THE FAILURE OF THE PROSECUTOR TO SHOW HIM PICTURES WHICH THE GOVERNMENT POSSESSED OF HIMSELF IN THE ACTUAL COMPANY OF WEYGAND AND VISCONTI, WHICH DISPLAY WOULD HAVE PRECLUDED THE COMMISSION OF PERJURY, AND ENABLED HIM TO RECANT IF NECESSARY.

A perusal of the minutes of the defendant's testimony in the Grand Jury reveals that his answers were predicated upon questions which were not clear in all instances and which elicited answers which we maintain could not have been perjurious. On pages 212 through 224 of the record there is set forth a portion of the Grand Jury minutes which the Government felt was most favorable to its position, but even here it is obvious that the defendant never said that he did not meet the individuals involved. For example, at page 215 of the

record the following quotations from the Grand Jury minutes appear:

> "Q. Did you meet that individual or did you not? A. I told you I can't be sure. I met maybe a hundred people up there."

When it came to admitting his complicity in the crime of bookmaking, the defendant answered unequivocally and was not being evasive at all.

At page 216 of the record the quotation from the Grand Jury minutes is as follows:

> "Q. Tell me what you were doing in February. A. Booking numbers.
>
> Q. You were booking numbers? A. Yes."

Later on, on the same page, the defendant was asked:

> "Q. Now, have you ever gone and met that person represented in that picture that is in front of you? You meet him at Fishkill on March 6, 1972? A. I'm telling you I could have met him. . . .
>
> Q. Why don't you remember especially when you were up there? A. I met a lot of people, some colored, some white, some girls, some Spanish. I'm not going to say I didn't meet him."

The defense maintained throughout that the specific purpose of the Grand Jury proceeding with regard to

Camporeale was to seek to obtain a perjury indictment. The Court asserted that it was not clear that the prosecutor, Mr. Friedman, had the photographs of Camporeale in the company of Weygand and Visconti when the Grand Jury proceeding was in progress.

We submit, however, that the Supreme Court of the United States expressly declared in Santobello v. New York, 404 U.S. 257, that with respect to the prosecution of any matter, "the left hand must know what the right hand is doing", and we submit therefore that it is no excuse for the Government to claim that the defendant was unfortunate because the particular prosecutor supposedly happened to be unaware of the existence of evidence which, in fairness, would have precluded a perjury indictment if it had been shown to him.

This is reminiscent of the admonitions of this Court in such cases as United States v. Baum, (2 Cir. 1973), 483 F.2d 1325, 1332, where this Court condemned tactics which smack "too much of a trial by ambush, in violation of the spirit of the rules". See also, United States v. Kelly, 420 F.2d 26, 29 (2 Cir. 1969).

At trial, the Government was not even able to establish what photographs were shown to the defendant during the Grand Jury proceeding. About 18 photographs were displayed to him before that body, but apparently there was no way of telling whether or not those pictures were the same that were used at the trial. It is beyond doubt, however, that the photographs obtained through surveillance activities were not displayed during the Grand Jury appearance of Camporeale.

We maintain that the special prosecutor, Mr. Friedman, could not have presented anything to the Grand Jury without having discussed the surveillance activities of the Federal Bureau of Investigation at great length. After all, no one suggests that Mr. Friedman conducted the investigation himself. It is a matter of common sense that necessarily Mr. Friedman must have known that photographs were taken during these surveillance activities. It is just inconceivable that after a nine month hiatus between the surveillance and the Grand Jury presentation, that none of the surveilling agents would have mentioned anything about these photographs to Mr. Friedman. (Cf. United States v. Mele, Docket No. 71-1579, 2 Cir. 1972.

The Government was hard pressed, but could not explain which pictures were shown to Camporeale when he appeared before the Grand Jury (234-236).

Under the circumstances we maintain that the argument of the defense counsel in the Court below that the purpose of the Grand Jury proceeding was not to conduct an investigation, but was primarily to obtain a perjury indictment, is completely valid.

(A)

IT WAS PREJUDICIAL FOR THE SAME GRAND JURY WHICH HEARD ABOUT CAMPOREALE'S CRIMINAL RECORD TO HAVE BEEN ASKED TO INDICT HIM.

In the Court below, defense counsel correctly, we maintain, objected to the indictment on the grounds that the same Grand Jury which indicted him had also been permitted to hear about his criminal record. We must bear in mind that there was no reason to elicit this criminal record since the investigation concerned gambling and information concerning gambling was being sought from the defendant.

If perjury was committed before this Grand Jury, then the crime was committed in their presence and they were alleged witnesses to this transgression. A witness, we submit, ought not sit as a determinor of any facts. A different Grand Jury should have been used to obtain a perjury indictment and we therefore also claim that it was error to have used the same Grand Jury to indict him.

(B)

THE RECENT CASE OF BRONSTON v. UNITED STATES, 409 U.S. 352, SUPPORTS APPELLANT'S POSITION THAT NO PERJURY WAS COMMITTED.

In the recent case of Bronston v. United States, 409 U.S. 352, (1973), the Supreme Court of the United States made it abundantly clear that since Section 1623 of Title 18, United States Code, made it easier to secure perjury convictions, that Congress balanced this approach by adding a recantation provision (18 U.S.C. 1623 (d)). Moreover, the Supreme Court of the United States declared that (id. 359):

> "A jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner; the state of mind of the witness is relevant only to the extent that it bears on whether 'he does not believe [his answer] to be true.' To hold otherwise would be to inject a new and confusing element into the adversary testimonial system we know. Witnesses would be unsure of the extent of their responsibility for the misunderstanding and inadequacies of examiners, and might well fear having that responsibility tested by a jury under the vague rubric of 'intent to mislead' or 'perjury by implication.' The seminal modern treatment of the history of the offense concludes that one considera-

> tion of policy overshadowed all others during the years when perjury first emerged as a common law offense: 'That the measures taken against the offense must not be so severe as to discourge witnesses from coming forward to testify.' New York Law Reform Commission. Study on Perjury 23 (1935)."

Finally, in Bronston, supra, which reversed this Court (453 F.2d 555), the Supreme Court asserted:

> "It may well be that petitioner's answers were not guileless but were shrewdly calculated to evade. Nevertheless, we are constrained to agree with Judge Lumbard who dissented from the judgment of the Court of Appeals, that any special problems arising from the literally true but unresponsive answer are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution."

Thus we maintain that there was no reason to prosecute the perjury in this case and that the prosecution seems to be inconsistent not only with the facts, which we maintain do not rise to the level of perjury, but also with respect to the holding of the Supreme Court in Bronston.

POINT III

THE COURT BELOW COMMITTED PREJUDICIAL ERROR BY REFUSING TO PERMIT THE DEFENSE WITNESS, ADDIE CORRADI, TO TESTIFY FROM HER RECORDS AT THE METHADONE CLINIC WHERE SHE WORKED, THAT CAMPOREALE HAD RECEIVED DOSES OF METHADONE ON THE DATES OF HIS GRAND JURY TESTIMONY.

The Court below permitted some testimony from the only defense witness, Addie Corradi, who was defendant's social worker and counselor at the Mount Vernon Methadone Clinic, that he was receiving treatment and methadone as a patient at that institution.

It was extremely material, however, to the defense to establish that Camporeale was under the influence of methadone when he testified in the Grand Jury. It appears that there were records that would have established this fact, but the Court refused to permit it (242-248). We maintain that this was highly prejudicial because it deprived appellant of an important defense which could have provided a reasonable doubt as to his intent.

Whether or not the Court appreciated the significance of this is irrelevant since we maintain that this Court, in its plenary powers to review, may determine the

relevance and materiality of this information as a matter of law (United States v. Devitt, 499 F.2d 135, 138 (8 Cir., 1974)).

In addition, under Chambers v. Mississippi, 410 U.S. 284, the Court should have ruled in favor of the admission of this evidence since it was so important to the defense.

POINT IV

TITLE 18 UNITED STATES CODE, SECTION 1623, IS UNCONSTITUTIONAL.

We recognize that there have been cases upholding the constitutionality of Section 1623 of Title 18 United States Code. We maintain, nevertheless, that the Section is unconstitutional and this Point is inserted so that there shall be no inference of any waiver on the part of the defendant of this important aspect. (See United States v. Koonce, 485 F.2d 374, 379; United States v. Lardieri, (3 Cir., 1974), 497 F.2d 317; United States v. Devitt, supra; United States v. Ruggiero, 472 F.2d 599 (2 Cir., 1973); and, United States v. Ceccerelli, (W.D. Pa., 1972), 350 F.Supp. 475).

With the enactment of the Omnibus Crime Control Law in 1970, there was mounted the most serious assault on the procedural safeguards embodied in our constitution ever launched by congress. This frightening legislation has overrun the borders of the Fourth, Fifth and Sixth Amendments to our Federal Constitution. The extent and severity of this invasion cannot be underestimated. Among its targets is the Miranda rule, transactional immunity, and privacy from electronic eavesdropping.

One column of this legislation, spearheaded by § 1623, has deeply penetrated the Sixth Amendment and attempts to effectively remove from perjury prosecutions the two witness rule, or the corroboration requirement, and has further increased the penalty for perjury from a fine of $2,000. to one of $10,000. For reasons we are unable to understand, congress left standing §1621 after enacting §1623. Consequently, there are now in existence two perjury laws, each entirely different from the other.

Section 1621 (the old section), as construed by the Supreme Court under the Sixth Amendment, required that a false statement had to be established by testimony

from two independent witnesses, or one witness supported by corroborating circumstances. Weiler v. United States, 323 U.S. 606 (1945). Accordingly, under the Sixth Amendment a conviction of perjury could not be secured or sustained on the uncorroborated testimony of one witness to the falsity of the matter on which the perjury was assigned.

Furthermore, this Court has held that a statement of an accused directly contradicting that on which the perjury is assigned is not sufficient evidence of the falsity of the latter, and other additional extrinsic evidence is necessary to establish its untruthfulness. United States v. Buckner, 118 F.2d 468 (2d Cir. 1941). These constitutional interpretations of §1621 by the Supreme Court and this Court are inspired under the Sixth Amendment's Confrontation Clause. In other words, these constitutional rules spring from Sixth Amendment genealogy. Section 1623 emasculates both of these ancient policies designed to protect defendants in perjury cases and is thus constitutionally deficient.

Section 1623 eliminates both the two-witness rule, or independent corroboration requirement, and allows a

conviction by proof that an accused, while under oath, made irreconcilable contradictory declarations material to the point in question.

Section 1623 is in direct definance of the carefully delineated constitutional rules formulated by the Supreme Court and this Court, and consequently must be struck down as unconstitutional.

We submit that there is denial of equal protection of the laws inherent in this legislation. Moreover it provides for discriminatory enforcement of a penal statute because the Government can now elect which section to use without any standard whatsoever to which the Court can look to determine whether or not there is a violation of due process. (Yickwo v. Hopkins, 118 U.S. 356 (1886), and Washington v. United States, 401 F.2d 915 (D.C. Cir., 1968)).

We recognize further that it may be that Bronston v. United States, 409 U.S. 352, supra, may arguendo be read as upholding the constitutionality of 18 U.S.C. 1623. We point out, however, that technically the section which the Supreme Court considered in Bronston was perjury under

18 U.S.C. 1621.

CONCLUSION

The judgment of conviction should be reversed.

Respectfully submitted,

IRVING ANOLIK
Attorney for Defendant-
Appellant

UNITED STATES COURT OF APPEALS: SECOND ~~XX~~ CIRCUIT

Index No.

USA,

Appellee,

- against -

MICHAEL CAMPOREALE,

Defendant-Appellant.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, James Steele, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 250 West 146th. Street, New York, New York

That on the 21st *day of* **January** *1975 at* **Foley Square, New Yor, New York**

deponent served the annexed Brief. *upon*

Paul J. Curran

the *in this action by delivering* 4 *true copy* us *thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

Sworn to before me, this 21st *day of* **January** *1975*

Robert T. Brin

James Steele

JAMES STEELE

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975